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CHIN KEK SHEN

v.

PP

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COURT OF APPEAL, PUTRAJAYA
MOHAMED APANDI ALI JCA
LINTON ALBERT JCA
HAMID SULTAN ABU BACKER JCA
[CRIMINAL APPEAL NO: B-05-83-03-2012]

C

5 APRIL 2013

CRIMINAL PROCEDURE: *Trial - Recall of witnesses - Application for - Failure of trial judge to allow defence application to recall prosecution witness - Discretion of court - Whether trial judge failed to exercise his*

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discretion judiciously - Whether failure to allow application amounts to mistrial and miscarriage of justice - Whether conviction safe - Criminal Procedure Code, s. 425

EVIDENCE: *Adverse inference - Failure of accused to call witness -*

E

Whether s. 114(g) Evidence Act 1950 can be invoked against accused - Illian & Anor v. PP - Whether court satisfied that evidence was in existence before invoking adverse inference - Whether s. 114(g) arbitrarily invoked - Whether conviction safe - Federal Constitution, art. 5(1)

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The accused ('appellant') was charged for trafficking in dangerous drugs under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). At the end of the prosecution's case, the High Court ruled that it was a case of possession and in consequence, the charge was reduced to an offence punishable under s. 39A(2) of the DDA. The appellant then pleaded guilty and was sentenced

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accordingly. Dissatisfied, the prosecution appealed and the Court of Appeal ordered the defence to be called on the original charge of trafficking. It was the prosecution's version that the appellant was arrested after he was found holding a plastic bag in which the dangerous drugs were found. On the contrary, the appellant

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submitted that he was arrested when he went to collect a gaming debt from Simon in a car ('the car') which belonged to one Nicole. The police recovered the bag from the booth of the car. The learned trial judge who had convicted the accused for possession heard the defence case and held that the offence of

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trafficking had been proven and accordingly, sentenced him to

death. The learned trial judge held, *inter alia*, that (i) the defence was an afterthought; and (ii) the failure to call Nicole attracted adverse inference. Dissatisfied, the appellant appealed to this court. The main contention in this appeal stemmed from the fact that the appellant's application to recall the prosecution's main witness ('SP1') under s. 425 of the Criminal Procedure Code ('CPC'), for further cross-examination in relation to the ownership of the car, was refused by the trial judge. Further, it was the appellant's contention that no proper consideration was given to the defence case and there was a wrong application of adverse inference against the appellant.

Held (allowing appeal; setting aside decision of High Court) Per Hamid Sultan Abu Backer JCA delivering the judgment of the court:

(1) Section 425 of the CPC applies to the prosecution as well as the defence and the court has a wide discretion to allow a witness to be called or recalled not only *vide* s. 425 but also under many other provisions of the law before the close of defence case. On the facts, it was plainly wrong for the trial judge, without good reasons, to arbitrarily disallow the appellant's application to recall SP1 knowing that the Court of Appeal had directed the defence to be called for trafficking which carried the penalty of death. (para 8)

(2) The learned trial judge refused to exercise his discretion judiciously to allow the defence to conduct his case according to law. The refusal of the learned judge to allow the witness to be recalled and subsequently making an adverse inference and remarks in respect of the defence case compromises the integrity of the decision making process and attracts the jurisprudence relating to mistrial as well as miscarriage of justice, which requires appellate intervention to rule that the conviction was not safe. (para 9)

(3) On the factual matrix of the case, it was not proper for the learned judge to have invoked an adverse inference pursuant to s. 114(g) of the Evidence Act 1950 ('the Act') against the defence for not calling Nicole. Section 114(g) of the Act could not be invoked against an accused nor could the failure of the accused to call any witness be made the subject of comment at a criminal trial. *(Illian & Anor v. PP*; refd) (paras 10 & 12)

A **(4)** The protection in art. 5(1) of the Federal Constitution is not afforded to the prosecution, plaintiffs or defendants in civil cases. One should not read s. 114(g) of the Act in a literal sense when it relates to the accused without considering not only the Federal Constitution but the criminal jurisprudence in
B common law jurisdiction which bend backwards to lean in favour of the accused as far as the justice of the case will allow. The only caveat is that it is for the court to balance public interest as well as to ensure that justice is not compromised to the detriment of the victim. (para 16)

C **(5)** As a general rule, no adverse inference can be drawn if there is a failure to obtain the evidence. Adverse inference can only be drawn if the evidence is withheld, unless the law says otherwise. Before invoking s. 114(g) of the Act, the court
D must be satisfied that the evidence was in existence and could be produced. However, this court was not able to find any adumbration on this issue by the learned judge which stands as *sine qua non* in order to draw adverse presumption and/or inference. The court had arbitrarily invoked s. 114(g).
E (para 17)

(6) It was plainly wrong and/or perverse for the court to consider the earlier plea of guilt by the appellant to a reduced charge at the prosecution stage. Such a consideration which is
F irrelevant in criminal jurisprudence as in the instant case had caused a mistrial and/or miscarriage of justice as it clouded the court from acting fairly and reasonably without bias whatsoever in assessing the defence version. The appellant's conviction was not safe and he was accordingly acquitted and
G discharged. (paras 20 & 21)

Bahasa Malaysia *Translation Of Headnotes*

Tertuduh ('perayu') telah dituduh mengedar dadah berbahaya di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB'). Di
H akhir kes pendakwaan, Mahkamah Tinggi memutuskan bahawa ia merupakan satu kes pemilikan dan oleh itu, telah mengurangkan pertuduhan tersebut kepada satu kesalahan di bawah s. 39A(2) ADB. Perayu kemudian telah mengaku bersalah dan hukuman sewajarnya dijatuhkan. Tidak berpuas hati, pihak pendakwaan telah

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merayu dan Mahkamah Rayuan mengarahkan supaya pembelaan dipanggil terhadap tuduhan awalan bagi pengedaran. Adalah versi pihak pendakwaan bahawa perayu telah ditangkap apabila dia dijumpai memegang satu beg plastik yang di dalamnya dadah berbahaya dijumpai. Sebaliknya, perayu berhujah bahawa dia ditangkap apabila hendak memungut hutang daripada Simon di sebuah kereta ('kereta itu') kepunyaan seorang bernama Nicole. Polis telah menjumpai beg tersebut dalam boot kereta itu. Yang arif hakim perbicaraan yang telah mensabitkan perayu dengan milikan telah mendengar kes pembelaan dan memutuskan bahawa kesalahan pengedaran telah pun dibuktikan dan dengan itu, perayu dihukum mati. Yang arif hakim memutuskan, antara lain, bahawa (i) pembelaan merupakan satu fikiran kemudian; dan (ii) kegagalan memanggil Nicole telah membangkitkan peruntukan anggapan bertentangan. Tidak berpuas hati, perayu merayu ke mahkamah ini. Perkara asas yang berbangkit dalam rayuan ini adalah bahawa permohonan perayu untuk memanggil semula saksi utama pendakwaan ('SP1') di bawah s. 425 Kanun Tatacara Jenayah ('KTJ'), bagi pemeriksaan balas berkenaan pemilikan kereta itu, ditolak oleh hakim perbicaraan. Tambahan, adalah hujahan perayu bahawa tiada pertimbangan diberikan terhadap kes pembelaan dan terdapat pemakaian salah anggapan bertentangan terhadap perayu.

Diputuskan (membenarkan rayuan; mengenepikan keputusan Mahkamah Tinggi)

Oleh Hamid Sultan Abu Backer HMR menyampaikan penghakiman mahkamah:

(1) Seksyen 425 KTJ terpakai terhadap pendakwaan dan juga bagi pihak pembelaan dan mahkamah mempunyai budi bicara yang luas untuk membenarkan saksi dipanggil atau dipanggil semula bukan sahaja melalui s. 425 tetapi di bawah peruntukan undang-undang lain sebelum kes pembelaan ditutup. Berdasarkan fakta, adalah salah untuk hakim perbicaraan, tanpa alasan munasabah, menolak permohonan perayu untuk memanggil semula SP1 dengan pengetahuan bahawa Mahkamah Rayuan telah mengarahkan pembelaan dipanggil terhadap pengedaran yang membawa kepada hukuman mati.

A **(2)** Yang arif hakim gagal melaksanakan budi bicara kehakimannya untuk membenarkan pembelaan menjalankan kesnya mengikut undang-undang. Kegagalan yang arif hakim untuk membenarkan saksi untuk dipanggil semula dan kemudian membangkitkan anggapan bertentangan berkenaan kes pembelaan mengkompromikan
B integriti proses membuat keputusan dan menarik jurisprudens berkaitan perbicaraan silap dan juga suatu salah laksana keadilan yang mewajarkan campur tangan rayuan untuk memutuskan bahawa sabitan tersebut tidak selamat.

C **(3)** Berdasarkan fakta matriks kes, yang arif hakim tidak sepatutnya membangkitkan anggapan bertentangan menurut s. 114(g) Akta Keterangan 1950 ('Akta') terhadap pembelaan atas kegagalan memanggil Nicole. Seksyen 114(g) tidak boleh dibangkitkan terhadap tertuduh dan kegagalan tertuduh memanggil
D seseorang saksi tidak boleh dijadikan perkara ulasan dalam perbicaraan jenayah *(Illian & Anor v. PP;* dirujuk).

(4) Perlindungan di bawah perkara 5(1) Perlembagaan Persekutuan tidak diberikan kepada pihak pendakwaan, plaintif atau pun defendan dalam kes-kes sivil. Seseorang tidak boleh membaca
E s. 114(g) Akta secara harfiah apabila berkaitan dengan tertuduh tanpa mempertimbangkan bahawa bukan sahaja Perlembagaan Persekutuan malah jurisprudens jenayah dalam bidang kuasa common law akan melakukan apa-apa sahaja yang memihak kepada tertuduh untuk memastikan keadilan.
F Satu-satunya halangan adalah ia merupakan tugas mahkamah untuk mempertimbangkan kepentingan awam bagi memastikan keadilan tidak dikompromi sehingga menjejaskan mangsa.

(5) Sebagai peraturan am, anggapan bertentangan tidak boleh
G dibuat jika terdapat kegagalan untuk memperolehi keterangan. Anggapan bertentangan hanya boleh dibuat jika keterangan disembunyikan, kecuali jika undang-undang memperuntukkan sebaliknya. Sebelum membangkitkan s. 114(g) Akta, mahkamah mestilah berpuas hati dengan kewujudan keterangan tersebut
H dan ia boleh dikemukakan. Walau bagaimanapun, mahkamah ini tidak dapat menemui apa-apa petunjuk berkenaan isu ini daripada yang arif hakim yang kekal sebagai *sine qua non* untuk membuat anggapan bertentangan dan/atau inferens. Mahkamah telah membangkitkan s. 114(g) dengan sewenang-wenangnya.

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(6) Adalah salah dan/atau bertentangan untuk mahkamah mempertimbangkan pengakuan bersalah terdahulu perayu kepada tuduhan yang dikurangkan pada peringkat pendakwaan. Pertimbangan sebegitu yang tidak relevan kepada jurisprudens jenayah seperti dalam kes ini telah menyebabkan perbicaraan silap dan juga suatu salah laksana keadilan memandangkan ia mengkaburi mahkamah daripada bertindak secara adil dan munasabah tanpa berat sebelah dalam menilai versi pembelaan. Sabitan perayu adalah tidak selamat dan dengan itu, dia dilepaskan dan dibebaskan.

Case(s) referred to:

Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd [1998] 2 CLJ 75 FC ***(refd)***

Choo Chang Teik & Anor v. PP [1991] 3 CLJ 2387; [1991] 1 CLJ (Rep) 54 SC ***(refd)***

Goh Ah Yew v. PP [1948] 1 LNS 13 HC ***(refd)***

Goi Ching Ang v. PP [1999] 1 CLJ 829 FC ***(refd)***

Illian & Anor v. PP [1988] 1 LNS 139 SC ***(refd)***

Jammu & Kashmir Bank Ltd v. Attar-ul-Nisa AIR 1967 SC 540 ***(refd)***

Loke Poh Siang v. PP [1956] 1 LNS 62 HC ***(refd)***

Mahabir Singh v. Rohini AIR 1933 PC 87 ***(refd)***

PP v. Abdul Rahim Abdul Satar [1990] 1 CLJ 840; [1990] 3 CLJ (Rep) 1 HC ***(refd)***

PP v. Mohd Aszzid Abdullah [2008] 1 MLJ 281 HC ***(refd)***

PP v. Phon Nam [1989] 1 CLJ 7; [1989] 1 CLJ (Rep) 142 SC ***(refd)***

PP v. Thenegaran Murugan & Another Appeal [2013] 4 CLJ 364 CA ***(refd)***

Ramli Kechik v. PP [1986] 1 CLJ 308; [1986] CLJ (Rep) 243 SC ***(refd)***

Sahabuddin and another v. State of Assam 2012 Cr A No 629 of 2010 SC ***(refd)***

Tan Ying Hong v. Tan Sian San & Ors [2010] 2 CLJ 269 FC ***(refd)***

Tay Kok Wah v. PP [2012] 4 CLJ 337 CA ***(refd)***

Tong Kam Yew & Anor v. PP [2013] 4 CLJ 470 CA ***(refd)***

Woolmington v. DPP [1935] AC 462 ***(refd)***

Yap Fook Yew & Anor v. PP [1949] MLJ Supp 3 ***(refd)***

Legislation referred to:

Criminal Procedure Code, s. 425

Dangerous Drugs Act 1952, ss. 39A(2), 39B(1)(a)

Evidence Act 1950, s. 114(g)

Federal Constitution, art. 5(1)

Other source(s) referred to:
Janab's Key To Criminal Procedure of Evidence, 2nd edn, 2010, pp 577 & 578
Nandi Criminal Ready Referencer, vol 2, p 1748

For the appellant - Teh Poh Teik (Shukri Mohamed with him); M/s Teh Poh Teik & Co
For the respondent - Yusaini Amer Abd Karim; DPP

[Appeal from High Court, Shah Alam; Suit No: B-05-83-03-2012]

Reported by Kumitha Abd Majid

JUDGMENT

Hamid Sultan Abu Backer JCA:

[1] The appellant/accused's appeal came up for hearing on 28 February 2013 and upon hearing we allowed the appeal on the same day. My learned brothers Mohamed Apandi Ali, JCA and Linton Albert, JCA have read the draft judgment and had approved the same. This is our judgment.

Brief Facts

[2] The appellant was charged for trafficking 646.1g 3, 4 – Methylenedioxymethamphetamine under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("DDA 1952"). At the end of the prosecution case the court ruled it was a case of possession only and in consequence reduced the charge to be punishable under s. 39A(2) of the DDA 1952. The appellant pleaded guilty and was sentenced to nine years' imprisonment and ten strokes of the rotan. The prosecution was dissatisfied and appealed and the Court of Appeal ordered the defence to be called on the original charge of trafficking. The learned trial judge who had convicted him for possession heard the defence case and held that the offence of trafficking had been proven and accordingly sentenced him to death.

[3] It must be noted that (i) the solicitor who acted at the prosecution stage was one and at defence stage another (ii) the learned judge at the end of defence case took into consideration the appellant's plea of guilt for possession previously *inter alia* to reject his defence and concluded as an afterthought.

Prosecution And Defence Version

[4] The prosecution version can be summarised as follows:

(i) The appellant was arrested along a five foot way to a shop;

(ii) He was holding a plastic bag in his right hand;

(iii) Appellant attempted to flee and put up a struggle; and

(iv) The plastic bag contained drugs which is the subject matter of the charge.

[5] The appellant's version can be summarised as follows:

(i) He went to collect a gaming debt from Simon in a car;

(ii) As he was walking to meet Simon he was arrested;

(iii) The police recovered the bag from the booth of the car; and

(iv) The car belongs to his girlfriend, 'Nicole'.

[6] It must be noted that upon the Court of Appeal ordering the defence to be called the counsel for the appellant made an application to recall the prosecution's main witness SP1 for further cross examination to put the defence case (*inter alia* ownership of the car) which was omitted by the previous counsel. The application was refused by the learned judge. In addition the learned judge in the grounds of judgment *inter alia* stated as follows:

(i) The defence was an afterthought;

(ii) Failure to call 'Nicole' could attract adverse inference;

(iii) Took into account the plea of guilt of the accused in the prosecution stage and that part of the judgment reads as follows:

> The defence version of not carrying the bag is accordingly rejected as to my mind the version has not caused any reasonable doubt as to the truth of the prosecution's case.
>
> The other telling facet of the case is that his version is in complete variance to the stand taken by him earlier in pleading guilty to the amended charge in that he was in custody and control of the offending drugs.

A He conveniently now tries to shift the blame to his previous lawyer for failing to put the afterthought defence to PW1.

The accused's manoeuvre to recall the arresting officer for further cross examination under s. 425 of the CPC is made too late in the day and to my mind an attempt to bolster
B the afterthought defence and was accordingly refused by me.

The evidence of Simon (DW2) does not in the slightest degree create a doubt in my mind nor affect the core of the truthfulness of the prosecution's case. Simon (DW2) is to my mind an interested witness but nevertheless I have
C cautioned myself that his testimony ought not to be rejected outright and have accordingly observed his demeanor which leads me to conclude that Simon (DW2) is an untruthful witness when he stated that the accused was not carrying anything and he did see the police taking out the bag from
D the boot of the car.

In conclusion it is my finding that the accused has failed to create any reasonable doubt to the prosecution's case nor has the accused rebutted the presumption of trafficking on a balance of probabilities. The prosecution has discharged
E its burden of proving its case beyond reasonable doubt.

The accused is accordingly convicted for the offence of trafficking as charged and is hereby condemned to the sentence of death by hanging from the neck.

F *Appellant's Complaint*

[7] The appellant's complaint can be summarised as follows:

(i) Wrong to refuse defence application to recall the investigating officer (SP1) pursuant to s. 425 of the CPC;
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(ii) Plainly wrong and/or perverse to have considered the earlier appellant's plea of guilt at the prosecution stage; and

(iii) Proper consideration was not given to the defence case, and
H wrong application of adverse inference.

[8] On the factual matrix of the case we take the view that it was plainly wrong for the learned trial judge without good reasons to arbitrarily disallow the appellant's application to recall SP1 to
I put the defence version that too knowing that the Court of Appeal had directed the defence to be called for trafficking which carries the penalty of death. Our reasons *inter alia* are as follows:

(i) It is well settled that the court has a wide discretion to allow a witness to be called or recalled not only under s. 425 but many other provisions of the law before the close of defence case. The threshold requirement for calling or recalling is that it **just needs to appear** (low threshold) it is essential to the just decision of the case (emphasis added). Section 425 of CPC reads as follows:

> Any court may at any stage of any inquiry, trial or other proceeding under this code summon any person as a witness or examine any person in attendance though not summoned as a witness, or recall and re-examine any person already examined, and the court shall summon and examine or recall and re-examine any such person in his evidence appears to it essential to the just decision of the case.

(ii) It will be a useful guide to reproduce a commentary passage to the above section by the learned author, Hamid Sultan Abu Backer, in the book titled *Janab's Key To Criminal Procedure of Evidence*, 2nd edn. 2010 pp. 577 and 578 which read as follows:

> This section gives *wide* power to the court at any stage of inquiry, trial or other proceeding to summon, examine, re-examine person in attendance or those who have given evidence if their evidence is essential to just decision of the case. It is appropriate to read this section with s. 162 of the code and s. 138(4) of the Evidence Act which are similar in nature. Further, there are other provisions in the code to recall witness (see ss. 162 and 173 of the code).

(iii) Section 425 of the CPC applies to the prosecution as well as the defence. The court has in almost all cases allowed the prosecution or the defence to call or recall the witness. In *Loke Poh Siang v. PP* [1956] 1 LNS 62; [1957] MLJ 107 it was stated that the court has an absolute discretion in recalling or calling a witness after the close of the prosecution case to rectify an omission in the prosecution evidence. (See *Ramli Kechik v. PP* [1986] 1 CLJ 308; [1986] CLJ (Rep) 243; [1986] 2 MLJ 33). The only caveat is that after defence has been closed no further evidence ought to be allowed unless the cause for such evidence is one which no human ingenuity could have foreseen. In *Yap Fook Yew & Anor v. PP* [1949] MLJ Supp 3, the court had this to say:

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> It has been laid down by the court of Criminal Appeal in England that after the defence has been closed no further evidence should be called either by the court or by either party unless the cause for such evidence is one which no human ingenuity could have foreseen.

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Although we accept the arguments of the learned DPP that the power under s. 425 is discretionary we must say it cannot be exercised arbitrarily but must be exercised judiciously failing which appellate interference may be warranted. (See *PP v. Phon Nam* [1989] 1 CLJ 7; [1989] 1 CLJ (Rep) 142 (SC)).

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[9] In the instant case not only has the learned judge refused to exercise his discretion judiciously to allow the defence to conduct his case according to law but also went on to say that the defence was an afterthought and failure to call 'Nicole' will

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attract adverse inference. In our view the refusal of the learned judge to allow the witness to be recalled and subsequently making adverse findings and remarks in respect of the defence case compromises the integrity of the decision making process and attracts the jurisprudence relating to mistrial as well as miscarriage

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of justice, which requires appellate intervention to rule that the conviction is not safe. In *PP v. Abdul Rahim Abdul Satar* [1990] 1 CLJ 840; [1990] 3 CLJ (Rep) 1; [1990] 3 MLJ 188 as Wan Yahya J (as he then was) had this to say:

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> The role of a judge in our adversarial system of justice has often been misunderstood. Although depicted symbolically as a blindfolded lady balancing the scales of justice, a judge should not be completely oblivious to the surround events at the trial affecting his assessment of a case. It is true that he must not load onto any side of the scales extrinsic evidence but he certainly owes a

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> duty to take onto the scales formal evidence which, although available and alluded to, was inadvertently left out by either party.

[10] We are of the considered view that it is not proper for the learned judge on the factual matrix of the case to invoke adverse

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inference pursuant to s. 114(g) of the Evidence Act 1950 ("EA 1950") against the defence for not calling 'Nicole'. The learned judge had taken great pains to analyse the jurisprudence relating to adverse inference against the accused in reliance of an article by a reputed author on adjectival law. The said article also

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dealt with the case of *Choo Chang Teik & Anor v. PP* [1991] 3

CLJ 2387; [1991] 1 CLJ (Rep) 54; [1991] 3 MLJ 423 where the Supreme Court disagreed to the proposition that adverse inference cannot be made at all against the accused and went on to provide a small window for that jurisprudence to sip through in limited circumstances. Indian cases also support the proposition that in limited circumstances adverse inference can be invoked against the accused with a caveat that it should be done with caution. A passage from learned authors of *'Nandi Criminal Ready Referencer'* vol. 2 p. 1748 will stand as a useful guide in respect of this issue in India. And that paragraph reads as follows:

> Against accused: In criminal cases court should not rely much on presumption under s. 114, illustration (g) in view of the power conferred under s. 311 (old sec. 540), Cr. P.C. – *Ram Jeet v. State* AIR [1958] All 439: [1958] Cr LJ 716.
>
> Court cannot compel an accused to produce a document which tends to incriminate him – State of *Gujarat v. Shyamlal* AIR [1965] SC 1251: [1965] 2 Cr LJ 256; *M.P. Sharma v. Satish Chandra* AIR [1954] SC 300; State of *Bombay v. Kathikalu* AIR [1961] SC 1808. If defence fails to adduce evidence to prove his plea (alibi, private defence, insanity etc.) adverse inference can be drawn – *Sheo Dina v. Emperor* AIR [1933] All 939: 35 Cr LJ 464; *Satya Vir v. State* AIR [1958] Cr LJ 1266. In a murder charge the accused falsely denied several relevant facts established conclusively. Adverse inference can be drawn against the accused – *Pershadi v. U.P. State* AIR [1957] SC 211: [1957] Cr LJ 328. Failure to render satisfactory account is a circumstance against the accused – *Bindeshwari Prasad v. Emperor* AIR [1949] Pat 69: 50 Cr LJ 108. Accused is charged of rape and causing death of victim. Failure of accused to explain the presence of dead body of victim on a cot inside the house of the accused is an incriminating circumstance – *State v. Gangula* [1996] Cr LJ 774 (SC).

[11] The learned judge's conclusion on this issue is found at pp. 59 and 60 of the record of appeal, and it reads as follows:

> In the light of the analysis aforesaid the principle deducible is that no adverse inference against an accused may be drawn by reason of his failure to call any witness for all he has to do is to raise a reasonable doubt. However, the failure to call any particular witness is a matter which the court may take into account in assessing the weight of evidence (without drawing any adverse

A inference) especially so when the potential witnesses were persons in respect of whom the prosecution had probably no means of knowing that they might have any relevant evidence to give until the accused himself came to give evidence.

B In the context of the factual matrix the existence of Nicole and her connection with the car came to light only when the accused gave evidence. Applying the principle as deduced above no adverse inference is drawn against the accused. However, the failure to call Nicole is a factor which court is not preluded from taking into consideration in assessing the weight of the accused's denial of C ever having seeing the plastic bag.

[12] On the above issue, we must say that as early as the year 1999 ie, before the decision in the case of *Choo Chang Teik*, the Supreme Court in *Illian & Anor v. PP* [1988] 1 LNS 139; [1988] 1 MLJ 421 had in immutable terms advocated that s. 114(g) of D EA 1950 cannot be invoked against an accused person nor can the failure of the accused to call any witness be made the subject of comment at a criminal trial. And Wan Suleiman SCJ had this to say:

E The application by the learned deputy to call an immigration officer under s. 425 of the Criminal Procedure Code to give evidence to rebut the evidence was refused, according to the learned trial judge, in order to maintain his impartiality, yet his Lordship chose to remark (at p. 164) that "it is incumbent upon F the defence to call this witness, let alone object to the calling of the witnesses", referring to the defence's objection of the calling of the immigration officer on the question of authenticity of the border pass, despite those authorities which make it more than abundantly clear that s. 114(g) of the Evidence Act cannot be invoked against an accused person or for that matter failure to call G any witnesses made the subject of comment to the jury at a jury trial.

[13] It must be noted that the Supreme Court in *Illian*'s case had relied on the Court of Appeal decision in *Goh Ah Yew v. PP* [1948] 1 LNS 13; [1949] MLJ 150 where it was stated:

H No inference can be drawn against an accused person in a criminal trial. There is no duty upon an accused person to call any evidence. He is at liberty to offer evidence or not as he thinks proper and no inference unfavourable to him can be drawn I because he adopts one course rather than the other.

[14] Such proposition of the law has also been dealt at length by my learned brother Justice Mohamed Apandi Ali in *Tay Kok Wah v. PP* [2012] 4 CLJ 337; [2012] 4 MLJ 502. The said proposition has been elevated to the status of law that is to say that the accused is exempt from s. 114(g) of EA 1950. And that proposition cannot be whittled by the apex court in subsequent judgment and if necessary can only be done by parliament because of the special protection entrenched in the Federal Constitution for the accused. Article 5(1) says:

> No person shall be deprived of his life or personal liberty save in accordance with law.

[15] In *Goi Ching Ang v. PP* [1999] 1 CLJ 829; [1999] 1 MLJ 507 the Federal Court has rightly asserted that any departure from the entrenched judicial interpretation laid down in the long line of decisions should be left to the legislature. The only caveat to this principle will be that such interpretation should not infringe any provision of the Federal Constitution. An interpretation which is in conflict with the Federal Constitution is a nullity *ab initio*, and such an interpretation will not tie the hands of the court to administer justice. (see *Badiaddin Mohd Mahidin & Anor v. Arab Malaysian Finance Bhd* [1998] 2 CLJ 75; [1998] 1 MLJ 393; *Tan Ying Hong v. Tan Sian San & Ors* [2010] 2 CLJ 269; [2010] 2 MLJ 1).

[16] The protection in art. 5(1) which is supreme in nature is not afforded to the prosecution or plaintiffs or defendants in civil cases. The difference is like apple and orange and one should not read s. 114(g) in a literal sense when it relates to the accused without considering not only the Federal Constitution but the criminal jurisprudence in common law jurisdiction which bend backwards to lean in favour of the accused as far as the justice of the case will allow. (See *Woolmington v. DPP* [1935] AC 462). The only caveat is that it is for the court to balance public interest as well as to ensure justice is not compromised to the detriment of the victim. In *Shahabuddin and another v. State of Assam* 2012 Cr A No 629 of 2010, the Supreme Court of India had this to say:

> Where our criminal justice system provides safeguards of fair trial and innocent till proven guilty to an accused, there it also contemplates that a criminal trial is meant for doing justice to all, the accused, the society and a fair chance to prove to the

A prosecution. Then alone can law and order be maintained. The courts do not merely discharge the function to ensure that no innocent man is punished, but also that a guilty man does not escape. Both are public duties of the judge. During the course of the trial, the learned president judge is expected to work
B objectively and in a correct perspective. Where the prosecution attempts to misdirect the trial on the basis of a perfunctory or designedly defective investigation, there the court is to be deeply cautious and ensure that despite such an attempt, the determinative process is not subserved. For truly attaining this object of a 'fair trial', the court should leave no stone unturned to do justice and
C protect the interests of the society as well.

[17] We also saw another flaw in the learned judge's judgment. The court arbitrarily invoked s. 114(g). Before invoking 114(g) for any matter the court must be satisfied that the evidence was in
D existence and could be produced. (see *Mahabir Singh v. Rohini* AIR 1933 PC 87). In the instant case we were not able to find any adumbration on this issue by the learned judge which stands as a *sine qua non* in order to draw adverse presumption and/or inference. It must not be forgotten that as a general rule no
E adverse inference can be drawn if there is failure to obtain evidence. Adverse inference can only be drawn if evidence is withheld unless the law says otherwise. (see *Jammu & Kashmir Bank Ltd v. Attar-ul-Nisa* AIR 1967 SC 540).

F **[18]** In the instant case the witness 'Nicole' is also a potential witness to the prosecution at least for the purpose of satisfying the maximum evaluation test. In such circumstances it was plainly wrong and perverse for the learned judge to rely on s. 114(g).

[19] The duty of the court at the end of the defence case in
G applying the jurisprudence relating to maximum evaluation and beyond reasonable test is to consider whether the defence evidence tested with the totality of the evidence warrants an acquittal or conviction for the original charge or reduced charge as the case may be (see *PP v. Mohd Aszzid Abdullah* [2008] 1
H MLJ 281). The court must refrain from making adverse comments on the shoddiness of the defence case, and apply *Radhi*'s direction with religious precision. (See *Tong Kam Yew & Anor v. PP* [2013] 4 CLJ 470, decision on 20 March 2013 Mahkamah Persekutuan website).

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[20] We are also of the considered view that it was plainly wrong and/or perverse for the court to consider the earlier plea of guilt by the appellant to a reduced charge at the prosecution stage. Such a consideration which is irrelevant in criminal jurisprudence in the instant case has caused a mistrial and/or miscarriage of justice as it clouded the court from acting fairly and reasonably without bias whatsoever in assessing the defence version. It must not be forgotten the requirement of impartiality is a principle of natural justice and a patent breach as in the instant case will compromise any decision making process.

[21] In conclusion taking into consideration all the issues which the appellant has complained we take the view it is not safe to convict the accused (see *PP v. Thenegaran Murugan & Another Appeal* [2013] 4 CLJ 364, decision on 21 March 2013 Mahkamah Persekutuan website). In consequence the appeal is allowed, the conviction and sentence by the High Court is set aside and the appellant is accordingly acquitted and discharged.

We hereby order so.